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No. 95-78

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

VALENTINO COLOROW,

Petitioner,

v.

THE STATE OF UTAH and JAN GRAHAM,
Utah Attorney General,

Respondents.

On Petition For Writ Of Certiorari
To The Utah Supreme Court

BRIEF IN OPPOSITION

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August 1995

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QUESTION PRESENTED

Respondents frame the two questions presented by Petitioner Valentino Colorow (Pet. at i), as the single, following question:

Do federal due process principles allow a state court to decide its criminal jurisdiction before trial, utilizing a statutory jurisdiction-supporting presumption when the jurisdiction-supporting evidence is otherwise inconclusive?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Utah Supreme Court opinion for which petitioner Colorow seeks review, *State and Graham v. Payne*, has not yet been published in the Pacific Reporter. It is reported in the Utah Advance Reports, 260 Utah Adv. Rep. 5 (Utah March 21, 1995). The Utah court's slip opinion is reprinted in appendix A to Colorow's petition for certiorari, and for convenience of this Court, citations to the opinion in this brief will reference appendix A of Colorow's petition.

JURISDICTION

Although Colorow invokes this Court's jurisdiction under 28 U.S.C. § 1257(a) (Pet. at 2), the Utah Supreme

Court opinion for which Colorow seeks review is not a "final judgment" within the meaning of section 1257(a). Therefore, as explained in Point I of this brief, this Court lacks jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Utah Code Ann. § 76-1-501 (1995) states:

> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" mean:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

(3) The existence of jurisdiction and venue are not elements of the offense but shall be established by a preponderance of the evidence.

Utah Code Ann. § 76-1-201 (1995) states, in pertinent part:

(1) A person is subject to prosecution in this state for an offense which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if:

(a) The offense is committed either wholly or partly within the state;

. . .

(2) An offense is committed partly within this state if either the conduct which is an element of the offense, or the result which is such an element, occurs within this state. In homicide, the "result" is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found

within the state, the death shall be presumed to have occurred within the state.

. . ..

Article III § 2 of the United States Constitution, and Amendments V, VI, and XIV § 1, invoked by Colorow, are set forth in his petition, at 2-4.

STATEMENT OF THE CASE

Colorow's detailed case statement (Pet. at 4-11) accurately recounts the proceedings to date in his noncapital state murder and kidnapping prosecution. Colorow challenges the Utah Supreme Court's holding, in granting the mandamus writ sought by the State, that state trial courts must decide criminal jurisdiction before trial, as a non-final matter, aided by the statutory presumption of jurisdiction in the territory where a murder victim's body is found. This pretrial determination, the Utah court held, is made without the assistance of a jury. *State and Graham v. Payne*, Pet. App. A at 31-32 & n.7.

For purposes of deciding whether to grant the writ, respondents highlight two features of this case: *First*, the state trial court has not yet decided jurisdiction under the procedure mandated by the Utah Supreme Court; accordingly, the case has not proceeded to trial. *Second*, under the evidence known to date, it cannot be positively determined whether the murder victim, Bill Poleviayoma, died within Indian Country or in state territory; it is undisputed, however, that Poleviayoma's body was found within state land (the "Gusher dump"), not in Indian Country.

REASONS TO DENY THE WRIT

I

THE UTAH SUPREME COURT'S OPINION IS NOT A FINAL JUDGMENT THAT CAN BE REVIEWED BY THIS COURT; SOUND JURISPRUDENCE ALSO COUNSELS AGAINST CERTIORARI REVIEW

Under 28 U.S.C. § 1257(a), this Court has jurisdiction to review "*final judgments or decrees* rendered by the highest court of a state" by writ of certiorari (emphasis added). While the opinion for which Colorow seeks review was issued by Utah's highest court, it is not a final judgment. This conclusion is compelled by the fact that the murder and kidnapping prosecution against Colorow must yet proceed through several stages before any final resolution of the case will be achieved. *See, e.g.*, *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (no final judgment when anything remains to be decided by state courts; finality of criminal case normally defined by guilty verdict and imposition of sentence).

Indeed, the rule for determining state court jurisdiction established by the Utah Supreme Court, which Colorow would have this Court review, has not yet been applied to Colorow. Under the procedure mandated by the state supreme court, the trial court may yet dismiss the prosecution for lack of jurisdiction. *See State and Graham v. Payne*, Pet. App. A at 32-33. And even if the trial court finds that it has jurisdiction, Colorow may have substantive defenses that will secure an acquittal on the murder and kidnapping charges. Only if the proceedings yet to be held (including an appeal of right in the Utah appellate system if convicted) are resolved

adversely to Colorow will there exist a final judgment that this Court could review by writ of certiorari.

Even if this Court decides that it has jurisdiction, sound jurisprudence counsels against granting certiorari review. For one thing, Colorow has *not*, to date, squarely challenged state court jurisdiction over his criminal prosecution; he has filed no motion to dismiss. Instead, Colorow has only stated an intention to produce jurisdiction-defeating evidence at trial:

> Although the Medical Examiner stated at the preliminary hearing that he could not determine with any certainty whether or not the wounds inflicted in Indian Country, or the wounds inflicted at the dump, resulted in the death of the defendant [sic: victim], (P.H. Tran. at 25), testimony will be presented at trial that the victim was in fact dead at the time he was loaded into the trunk which undisputedly took place on the reservation.

(Resp. to Pet. for Extraordinary Writ, Utah Sup. Ct. No. 950042, at 6). Colorow has not yet produced any evidence that Poleviayoma actually died in Indian Country.

Under these circumstances, there really is no proper Article III "case or controversy" before this Court. And because Colorow may defeat state court jurisdiction under the procedure mandated by the Utah Supreme Court, a grant of federal certiorari review at this point could result in an advisory opinion. It would certainly amount to premature intrusion into state affairs, and raise a risk of piecemeal litigation. This Court disapproves of such practice. *See, e.g.*,

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

II

COLOROW'S "DUE PROCESS" ARGUMENT RAISES NO IMPORTANT FEDERAL QUESTION; IT IS ALSO UNSUPPORTED ON THE MERITS

Colorow inaccurately contends that the existence of differing state procedures for deciding criminal jurisdiction creates an important federal question (Pet. at 12-20). *See* R. Sup. Ct. 10.1(b). Federalism principles inherently contemplate that individual states will develop differing ways of administering justice--including different ways of deciding state court jurisdictional disputes. *See United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1626 (1995) (describing "first principles" of federal system). And Colorow does not argue that Utah's procedure for deciding jurisdiction in this case encroaches upon federal Indian Country jurisdiction, conferred by 18 U.S.C. § 1153. In short, Colorow raises no federal question that requires review by this Court.

Further, Colorow's proposed argument to this Court lacks merit. In effect, Colorow wants this Court to overrule or amend Utah Code Ann. § 76-1-501(3) (1995), which states that jurisdiction is not an element of state criminal offenses, and need only be proven by a preponderance of the evidence. To support that argument, he misrelies on *In re Winship*, 397 U.S. 358, 362 (1970), and *Sandstrom v. Montana*, 442 U.S. 510 (1979) (Pet. at 22-23). Those cases do not address jurisdiction. Rather, they deal with the cornerstone principle that the *elements of crimes* must normally be proven beyond

reasonable doubt, and without resort to presumptions. More on-point, and running against Colorow's due process claim, is *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972), holding that the question whether a confession was voluntary, and therefore admissible at trial, is only subject to the "preponderance of evidence" standard. The jurisdictional dispute in this case, which really amounts to a decision which forum--state or federal--will try Colorow, surely can be legitimately decided under Utah's standards.

Colorow also challenges Utah Code Ann. § 76-1-201(2) (1990), which creates the presumption of jurisdiction in the territory where a homicide victim's body is found. This statute comes from the American Law Institute's Model Penal Code. MODEL PENAL CODE § 1.03(4), at 33-34 (1985) (quoting the model statute). The model code's notes explain that such statutes are intended to "to prevent abortion of the prosecution in cases where the body of the victim is found within the state but it is unclear where the death, injury, or conduct occurred." *Id.* at 63-64 & nn. 99-101. Similar statutes have been adopted by many states, *see id.* at 65 & n. 104. Colorow cites no instance in which a court has declared such a statute unconstitutional; nor are respondents aware of any such case.

In fact, "abortion of the prosecution" is really what Colorow seeks. By making it more difficult for the state courts to gain jurisdiction, a gap would open between state and federal criminal jurisdiction. Federal courts deem Indian Country jurisdiction an element of the crime, to be proven beyond reasonable doubt, so that an "acquittal" could result for lack of jurisdiction. *See Lucas v. United States*, 163 U.S. 612, 616-17 (1896); *United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976). Similarly restrictive standards for

proving state court jurisdiction would allow Colorow to challenge jurisdiction in both federal and state court; if jurisdiction could not be proven in either forum, Colorow could evade justice regardless whether he is guilty or not guilty of the charged crimes. Due process, rationally viewed, surely does not require such an unjust result. The Utah Supreme Court's ruling properly narrows this jurisdictional gap, reducing the prospect of such a result.

Finally, the State of Utah has never, at any stage in Colorow's prosecution, sought to evade or undermine the principle that Colorow's guilt must be proven beyond reasonable doubt. Upon trial in the state court (assuming the case proceeds that far), the State will be mindful of, and obedient to, that cornerstone due process obligation.

CONCLUSION

For the foregoing reasons, Colorow's petition for writ of certiorari should be DENIED.

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